

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



In the Matter of

: Date Issued: Feb. 6, 2001

JOHN A. KINCAID,

Case No.: 2000-BLA-80

Claimant,

VS.

PCR PARTNERSHIP JOINT VENTURE,

Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest

John A. Kincaid,
Pro Se Claimant

Robert Weinberger, Attorney
For the Employer

Before: Edward T. Miller
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a first claim for benefits under the Black Lung Benefits Act as

amended, 30 U.S.C. §§ 901 *et seq.* (“the Act”), and the regulations promulgated thereunder.¹ Since this claim was filed after March 31, 1980, Part 718 applies. §718.2 Because the Claimant Miner was last employed in the coal industry in West Virginia, the law of the Fourth Circuit of the United States controls. (D-22) *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant filed this claim for benefits on January 19, 1999. (D-1) It was initially denied by the District Director on April 29, 1999, finding that Claimant does not have pneumoconiosis, that his pneumoconiosis is not due to coal mine employment, and he is not totally disabled by the disease. Claimant then submitted additional evidence. The Director determined that the Claimant was not entitled to benefits, finding that the reasons for the prior denial had been unchanged by the new evidence. (D-21, 26) The Claimant requested a hearing on August 5, 1999, and the claim was referred to the Office of Administrative Law Judges. (D-22) A preliminary hearing was held, but not completed, before Judge Holmes on March 16, 2000. (Tr. 5) The case was continued and a formal hearing was held before this tribunal on September 19, 2000, in Beckley, West Virginia. Exhibits D-1-28 and C-1 were admitted into evidence without objection.

Issues

1. Has the Claimant proved the existence of coal workers’ pneumoconiosis?
2. Was the Claimant’s pneumoconiosis, if proved, caused by his coal mine employment?
3. Is the Claimant totally disabled due to pneumoconiosis?

Findings of Fact, Conclusions of Law, and Discussion

Background, Dependents, and Coal Mine Employment

Claimant, John A. Kincaid, was born on October, 22, 1933, and possesses an eighth grade education. For the purposes of augmentation of benefits, Claimant has a dependent wife, Barbara Jean Kincaid. The parties stipulated to at least twenty years of qualifying coal mine employment. (Tr.12) Claimant last worked as a coal miner in 1989. (Tr. 16) Based upon Claimant’s application, and employment and Social Security records, this tribunal finds 24 years of qualifying coal mine employment. (D-1, 3)

¹All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Because this claim was pending when Part 718 and Part 725 of the Regulations were amended, and because effective January 19, 2001, it is considered and decided under the amended regulations. 65 Fed. Reg. 80, 045 (December 20, 2000) Director’s Exhibits are denoted “D-”, Claimant’s Exhibits are denoted “C-“, and citations to the hearing transcript are denoted “Tr.”

Medical Evidence

*X-rays*²

Exhibit	Doctor³	Date	Qualifications⁴	Interpretation
C-1	R. Valiveti	11/3/98		Negative
C-1	E. Dehgan	11/3/98		Positive
C-1	E. Dehgan	11/11/98		Negative
C-1	Bharat Patel	11/16/98		Negative
D-15	Manu Patel	2/24/99	BCR/B	Positive, 1/0
D-12	S. Narvani	2/24/99	BCR/B	Negative
D-11	Gaziano	2/24/99	B	Negative
D-9	Zaldivar	2/24/99	B	Negative
D-18	Cappiello	3/11/99	BCR/B	Positive, 1/1; large opacities, Cat. A
D-19	Aycoth	3/11/99	BCR/B	Complicated pneumoconiosis, Cat. A; Simple, 1/1
D-9	Zaldivar	4/17/99	B	Negative
D-20	Manu Patel	6/21/99	BCR/B	Positive

²Dr. Doyle's report dated October 14, 1999, referred to a chest x-ray dated December 28, 1999, which "showed simple occupational pneumoconiosis changes." (C-1) However, because this report is dated prior to the x-ray date, and the nonconforming x-ray apparently was not taken by Dr. Doyle, and is not among the x-rays otherwise of record, the reference in the report to the x-ray reading is not deemed to be probative evidence.

³The qualifications of Drs. Bharat Patel, E. Dehgan, and R. Valiveti were not contained within the record.

⁴The abbreviation "BCR" denotes that a doctor is a board-certified radiologist; "B" denotes that a doctor is a B-reader.

Pulmonary Function Studies⁵

Exhibit	Doctor	Age/ Height	Date	FEV1	FVC	MVV	Qualifying	Conforming
D-7	Rasmussen	65/ 65	2/24/99	1.84 2.12*	3.39 3.28*	74 107*	No	Yes
D-9	Zaldivar	65/ 66	3/17/99	.96 1.74*	2.56 3.51*	37 99*	No	Yes

*Post-Bronchodilator

Arterial Blood Gas Studies⁶

Exhibit	Test Date	Doctor	pO2	pCO2	Conforming	Qualifying
C-1	11/05/98	Boustani	63	49		No
D-7	02/24/99	Rasmussen	64	40	Yes	No
D-9	03/17/99	Zaldivar	72	37	Yes	No

Medical Reports/Opinions

Dr. Mayez El-Harake examined Claimant on November 3, 1998, and recorded his social, work, and medical histories. Based upon his examination, Claimant's histories, and laboratory data, Dr. El-Harake opined that Claimant had hypereosinophilic syndrome, respiratory insufficiency, and normocytic anemia. Regarding Claimant's respiratory insufficiency, Dr. El-Harake stated that Claimant would be given nebulizer treatments and that an echocardiogram would be performed to look for cardiomyopathy. The doctor made no findings as to the cause or the extent of Claimant's respiratory insufficiency. (C-1)

Dr. Maria Boustani provided a consultative report for Dr. El-Harake, on November 5, 1998.

⁵Dr. Rasmussen noted that Claimant was cooperative and his effort was good. Dr. Zaldivar's report does not mention Claimant's effort or cooperation.

⁶Dr. Doyle's report dated October 14, 1999 stated that "recent arterial blood gas studies have shown pH 7.42, pCO2 49, pO2 50 on room air." (C-1) However, because it is unclear who performed or interpreted these nonconforming tests, or when they were administered, and because the results are not among the other studies of record, this reference in Dr. Doyle's report is not deemed to be probative.

After performing specified medical tests, recording Claimant's social, family, and medical histories, and performing a physical examination, the doctor opined that Claimant had peripheral eosinophil, with slight nodular interstitial infiltrates. The doctor opined that a malignancy could not be ruled out, nor could sarcoidosis or tuberculosis. Dr. Boustani did not state whether Claimant had any respiratory impairment, or whether Claimant was disabled or to what extent. (C-1)

On November 16, 1998, Dr. Wassim Saikali examined Claimant, recorded Claimant's medical history, and interpreted the results of an x-ray, an ultrasound, and a CT scan. The doctor noted that a skin biopsy was needed. However, the doctor did not conclude that Claimant had an occupationally acquired disease. Additionally, Dr. Saikali did not indicate whether Claimant was disabled, or, if so, to what extent. (C-1)

Dr. Dan Doyle examined Claimant on January 12, 1999. In his report dated October 14, 1998, Dr. Doyle noted that Claimant had a history of progressive exertional dyspnea, and 38 years of exposure to coal mine dust. The doctor did not record Claimant's history of cigarette smoking. Dr. Doyle noted Claimant's recent hospitalizations for breathing difficulties and possible vasculitis syndrome. Based upon his examination, a positive x-ray interpretation that this tribunal has determined is not probative, and Claimant's occupational work history, the doctor determined that while "there is no question that there are other contributing factors to Mr. Kincaid's pulmonary problems, I do not feel it possible, therefore, to rule out the contribution of occupational pneumoconiosis and occupational dust exposure." (C-1) The doctor did not opine as to the extent of any impairment.

Dr. Rasmussen, board-certified in internal medicine, examined Claimant on February 24, 1999. The doctor recorded Claimant's social, employment, and medical histories. The doctor noted that Claimant smoked a pack of cigarettes a day for approximately 25 years and was employed for 38 years as a coal mine worker. Additionally, the doctor performed specified medical tests, noting that the pulmonary function and blood gas studies indicated a minimal impairment in Claimant's respiratory function. Dr. Rasmussen opined that such an impairment would not prevent Claimant's resumption of his last regular coal mine employment. Based upon the test results, his recorded histories, and an x-ray interpreted by Dr. Manu Patel, Dr. Rasmussen opined that it was medically reasonable to conclude that Claimant had coalworkers' pneumoconiosis, which arose from his coal mine employment. Dr. Rasmussen noted that several risk factors existed in addition to Claimant's coal mine dust exposure, which included his cigarette smoking, and vasculitis. Dr. Rasmussen opined that Claimant was severely incapacitated as a consequence of his vasculitis. (D-8)

Dr. Zaldivar, board-certified in internal medicine and pulmonary disease, examined Claimant on March 17, 1999. The doctor recorded Claimant's social, employment, and medical histories, performed specified medical tests and a physical examination of Claimant. Dr. Zaldivar recorded 30 years of coal mine work. The doctor, a B-reader, interpreted an x-ray as negative for pneumoconiosis. Dr. Zaldivar noted that the pulmonary function studies revealed a normal lung capacity, with moderate to severe reversible obstruction, and a mild diffusion impairment. Based upon these findings, Dr. Zaldivar opined that there was no evidence of coal workers' pneumoconiosis.

The doctor opined that a pulmonary impairment was present and derived from Claimant's untreated asthma, and a small amount of emphysema. Dr. Zaldivar noted that asthma is not a manifestation of coal workers' pneumoconiosis. The doctor opined that this impairment would prevent the Claimant from performing his usual coal mine work. In addition to Claimant's pulmonary impairment, the doctor noted that Claimant had an impairment that was related to his vasculitis. (D-9)

Elements of Entitlement

In order to establish entitlement to benefits with respect to a living miner's claim pursuant to Part 718, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment and that his pneumoconiosis is totally disabling. §§718.1, 718.202, 718.203, 718.204. Failure of Claimant to establish any one of these elements precludes entitlement. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Benefits under the Act are awarded to persons who are totally disabled due to pneumoconiosis, within the meaning of the Act. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201

Pneumoconiosis

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions, which are set forth in §§718.304, 718.305, 718.306; (4) or a finding by a physician of pneumoconiosis as defined in §718.201, which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy; thus §718.202(a)(2) does not apply.

There are twelve x-ray interpretations in the record. Of the twelve, seven of the readings were negative for pneumoconiosis and five were positive. Of the seven negative interpretations, only one was by a dually qualified physician, a doctor who was both a B-reader and a board-certified radiologist, and three were by B-readers. Of the positive readings, four of the five were by dually qualified physicians. When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The weight of the x-ray interpretations by physicians with the highest credentials indicates a finding of pneumoconiosis. Therefore, based upon the weight of the readings by the best qualified doctors of the most recent x-rays, this tribunal finds that Claimant has established the existence of the disease pursuant to §718.202(a)(1).

Section 718.202(3) provides that if the presumptions under §§718.304, 718.305, or §718.306 are applicable, it shall be presumed that the miner is suffering from pneumoconiosis. The presumptions under §§ 718.305 and 718.306 are inapposite because the claim was filed after 1981, and because the miner is living. However, §718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which by chest x-ray yields one or more large opacities greater than one centimeter in diameter and would be classified in Category A, B, or C in the ILO-U/C classification, or which by autopsy yields massive lesions in the lung, or is otherwise is diagnosed by unacceptable medical procedures to be a condition which could reasonably be expected to yield the same results. Both Dr. Cappiello and Dr. Aycoth, B-readers and board-certified radiologists, read x-rays as positive for complicated pneumoconiosis. However, because only two of twelve x-rays were read as positive for complicated pneumoconiosis, and because there is no other corroborating evidence of complicated pneumoconiosis in the evidentiary record, this tribunal finds that Claimant has not established the existence of complicated pneumoconiosis, or invoked the presumption under §718.304, and thus not established the existence of pneumoconiosis pursuant to §718.202(3).

Section 718.202(a)(4) provides that a claimant may establish the existence of pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the claimant suffers from pneumoconiosis. In evaluating the opinions of physicians, the administrative law judge must initially determine whether each medical report of record relevant to the issue was reasoned and documented, and must provide reasons for discounting opinions, as required by the APA.⁷

The record contains six doctors' reports. Of the reports, only three, Drs. Doyle's, Rasmussen's, and Zaldivar's, make determinations as to whether Claimant has any occupationally related disease. This tribunal finds the report of Dr. Doyle to be unpersuasive because it is neither well reasoned nor well documented. An unsupported medical conclusion is not a reasoned opinion. *Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *see also Phillips v. Director, OWCP*, 768 F.2d 982, 8 BLR 2-16 (8th Cir. 1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his diagnosis). Dr. Doyle concluded that it was likely that Claimant had coal workers' pneumoconiosis, which he opined derived from his coal mine employment. The doctor stated that he made his determination based upon a positive chest x-ray and Claimant's coal mine employment. However, Dr. Doyle relied on a nonconforming positive x-ray interpretation and nonconforming blood gas studies, which this tribunal has determined are not probative because they make reference to results without specifying who performed the tests, who interpreted the results, when the tests were performed, and other necessary data. Additionally, Dr. Doyle's record of Claimant's employment and social histories are inconsistent with the findings of this tribunal. The doctor recorded that Claimant was exposed to occupational coal mine dust for 38 years, and this tribunal has found 24

⁷5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).

years of coal mine employment based on the evidence of record.⁸ Also, Dr. Doyle's report omitted reference to Claimant's 25 years of cigarette smoking.

The reports of Drs. Rasmussen and Zaldivar, both qualified physicians, are well documented and well reasoned. Both doctors based their determinations upon Claimant's histories, a physical examination, an x-ray interpretation, and specified tests. The doctors recorded their results, interpreted them, and explained their conclusions. Dr. Rasmussen opined that Claimant had pneumoconiosis, and Dr. Zaldivar opined that Claimant did not. While both doctors relied upon evidence that is well documented, the persuasiveness of the doctors' diagnoses is impacted by their reliance, in part, upon an x-ray interpretation. Dr. Rasmussen relied upon the positive reading of Dr. Manu Patel, a dually qualified physician, and Dr. Zaldivar, a B-reader, relied upon his own negative reading. Dr. Zaldivar's opinion is not discredited because it was based upon an x-ray interpretation which was outweighed by other x-ray interpretations of record. However, it is less persuasive than the opinion of Dr. Rasmussen, which relied in part upon a positive interpretation that was consistent with this tribunal's finding. *See Fitch v. Director, OWCP*, 9BLR 1-45, n.2 (1986). Accordingly, this tribunal finds that the best reasoned physician's opinion indicates that Claimant has pneumoconiosis.

Once it has been determined that a claimant has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. §718.203(a) Because Claimant was employed in the coal mines for more than ten years he is entitled to the presumption that his pneumoconiosis was caused by his coal mine employment under §718.203(b), which has not been rebutted.

Total Disability

In addition, to be entitled to benefits, Claimant must also establish that he is totally disabled. Claimant would be considered totally disabled if he has a pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work and from engaging in comparable gainful employment as defined in §718.204(b)(1). Section 718.204(b)(2) provides that the criteria for determining whether a miner is totally disabled are: (1) pulmonary function tests qualifying under applicable regulatory standards, (2) arterial blood gas studies qualifying under applicable regulatory standards, (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure, or (4) proof of a totally disabling respiratory or pulmonary condition on the basis of the reasoned

⁸ Both Dr. Doyle and Dr. Rasmussen recorded that Claimant had 38 years of coal mine employment, and Dr. Zaldivar recorded 30 years. This tribunal has found that Claimant has 24 years of qualifying coal mine employment. The reasons for the doctors' findings are unclear. The discrepancy between the findings is unremarkable in and of itself because of Claimant's extensive coal mine dust exposure. However, Dr. Doyle's inaccurate record of Claimant's coal mine employment is significant because the other evidence that the doctor relied upon is similarly unreliable. Dr. Zaldivar's and Dr. Rasmussen's reports, on the other hand, were based upon well documented tests and examinations, and well reasoned medical conclusions.

medical opinion of a physician relying upon medically acceptable diagnostic techniques. If there is contrary evidence in the record, all evidence must be weighed as a whole to determine whether there is proof by a preponderance of the evidence that the miner is thus totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

None of the valid pulmonary function studies and arterial blood gas studies of record produced qualifying results; therefore, Claimant has not established total disability under §§718.204(b)(2)(i) or (ii). Because there is no evidence of cor pulmonale with right sided heart failure in the record, Claimant has not established total disability under § 718.204(b)(2)(iii).

Total disability may be established by the opinion of a physician, exercising reasoned medical judgment which indicates that the miner is suffering from a totally disabling respiratory or pulmonary impairment. §718.204(b)(2)(iv) Such an opinion must be both well-documented and well-reasoned, and it must be based, at least in part, upon the results of objective medically acceptable laboratory and clinical diagnostic techniques. The reasoned medical opinions of the physicians of record do not establish total disability under §718.204(b)(2)(iv). Only Drs. Rasmussen and Zaldivar made determinations as to the extent of Claimant's disability. Dr. Rasmussen concluded that Claimant retained the pulmonary capacity to perform his usual coal mine employment or comparable work. Dr. Zaldivar opined that Claimant was totally disabled due to his pulmonary impairment and vasculitis. Dr. Rasmussen's report is more persuasive than Dr. Zaldivar's because it is consistent with the nonqualifying pulmonary function studies and arterial blood gas results, and the findings of this tribunal that the existence of pneumoconiosis has been established. Additionally, neither doctor found that Claimant was totally disabled due to pneumoconiosis. Dr. Zaldivar did not because he concluded there was no pneumoconiosis. Thus, regardless of which opinion is accepted, that essential element of proof would fail. Accordingly, this tribunal finds that Claimant has not established a totally disabling pulmonary or respiratory impairment or total disability due to pneumoconiosis by a preponderance of the evidence. §718.204(b)(2)(iv)

Because the preponderance of the evidence does not establish the existence of total disability, Claimant has not established a necessary element of entitlement to benefits. Therefore, his claim must be denied.

Attorney's Fee

The award of an attorney's fee under the Act may be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

The claim of John A. Kincaid for benefits under the Act is hereby denied.

EDWARD TERHUNE MILLER
Administrative Law Judge
WASHINGTON, DC

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.